

2019 ADVANCED DUI TRIAL ADVOCACY

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MOTIONS IN LIMINE

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MOTIONS IN LIMINE – or the best defense is a good offense!

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The best defense is a good offense

- Vince Lombardi- The best defense is a good offense (football).
- George Washington- (1799) '(M)ake them believe, that offensive operations, often times, is the surest if not the only (in some cases) means of defence. (war)
- Mao Zedong- "the only real defense is an active defense - success rests on destroying the enemies ability to attack. This also parallels Machiavelli and Sun Tzu (politics)
- Wing Chun Kung Fu- "The hand which strikes also blocks" (martial arts)



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Motions In Limine

- The overall idea is being proactive, instead of having a passive attitude, will preoccupy your opposition and hinder their ability to mount any counter-attack, leading to you having a strategic advantage!
- As trial attorneys, we don't go into trial expecting to lose.

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Motions in Limine

- Motion in Limine- "A written motion which is usually made either before or after the beginning of a jury trial for a protective order against prejudicial questions and statements."

Blacks Law Dictionary

(From Latin-meaning "on the threshold")

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Motions in Limine

8 good reasons to use for DUI cases

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Motions in Limine - 8 reasons

- 1) Helps admissibility of your evidence
- 2) Excludes inadmissible defense evidence (huge!)
- 3) You knowing what your evidence is ahead of trial assists with your trial strategy

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Motions in Limine- 8 reasons

- 4) Nudges the defense where you want the trial to go
- 5) Gives you time to create alternative plans if your evidence is not admitted.
- 6) Winning a Motion in Limine helps you to settle cases ahead of trial

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Motions in Limine-Why?

- 7) It allows you to file appellate actions as necessary before the beginning or middle of trial.
- 8) Clears objections off your list of "did I really do that?" in cases of appeals
- 9) (Bonus) -Fills your DUI trial notebook!

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Your Motions in Limine-How?

- For DUI's -Focus in on two types
- 1) File objections to Defense alleged evidence
- 2) File requests to admit your evidence

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Motion in Limine

- Should you submit prior to trial?

YES (despite State v. Alvarez)

ALWAYS BEST IF YOU FOLLOW THE RULES OF CRIMINAL PROCEDURE

Rule 35.1- Must be in writing

Rule 16.1 (B) – Must be timely (20 days prior to trial)

See State v. Aguilar, 171 Ariz. 444 (App. 1992)

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Motion in Limine

- BUT IF YOU MISS YOUR 20 DAY DEADLINE :

– State v. Alvarez, 228 Ariz. 579 (App. 2012)

- In criminal cases “[A] pretrial motion in limine is merely a convenient substitute for evidentiary objections at trial.
- State may wish to object to defendants proposed evidence at trial- and is not required to submit a written motion in advance of trial.”

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Motion in Limine

- QUESTION – Must you still object at trial if you filed a motion in limine?

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Motions in Limine- AZ Case law

- It can preserve issues for appeal or special action
 - “Where a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.”
 - See State v. Leyvas, 221 Ariz. 181 (App. 2009)
 - Bad- State v. Reyes, 238 Ariz. 304, 307 (App. 2015)
 - But see Rules of Evid. 103!

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Motions in Limine- AZ Rules

- AZ Rules of Evidence Rule 103 (2) (b) –
 - Do not need to renew an objection or Offer of Proof.
 - Once the court rules definitively on the record either before or after trial- a party need not renew an objection or offer of proof to preserve the claim of error for appeal.
 - (So try to make sure the court rules definitively.)

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Motions in Limine

- How do you argue that the Judge should rule ahead of trial?
 - Best bet - Rules of Criminal Procedure 103 (d) – Prevent The Jury From Hearing Inadmissible Evidence
 - “To the extent possible, the Court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.” (emphasis added).

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Defense Counsel Motions In Limine



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A typical Defense Motion in Limine

- 1) Preclude officers improper opinion of Impairment
- 2) Suppress for non-disclosure of Evidence (Rule 15/Brady)
- 3) Limit scope of rebuttal to only its proper purpose
- 4) Must pre-instruct the jury on reasonable doubt
- 5) Preclude improper testimony or argument (Societal risks involved with DUI's)
- 6) Instruction on Burden of Proof (Innocent UNLESS proven guilty-not until proven guilty)

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Common defense motions in Limine

- 7) Motion to Prohibit Use of FST's (HGN) – (Ask court to prohibit any testimony on officer administering FST's to determine if defendant is okay to drive, able to drive, etc.)
- 8) Prohibit any mention of tolerance to the effects of alcohol or drugs as mere speculation
- 9) Preclude Improper Opinion of Criminalist (personal opinion irrelevant-must be opinion held by scientific community on any subject within their knowledge)
- 10) Preclude improper comparison of number of DUI Investigations to Number of arrests
- 11) Preclude the use of the word "Intoxicants" as it invades the province of the jury to determine if intoxicating. Can only use term "Alcoholic beverage".

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Common defense motions in limine

- 12) Improper correlation of HGN in the absence of a chemical Test (Lopresti)
- 13) Improper correlation of HGN to estimated BAC (State Expert must perform a formal retrograde)
- 14) Preclusion of inadmissible hearsay-introducing any evidence of the officers accuracy on HGN. The officers records are also self-serving hearsay.
- 15) Preclude the officer as an Expert – preclude any officer present at FST's from stating the defendant displayed any signs or symptoms of impairment.- (ultimate issue and officers are not experts.)

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Common defense motions in Limine

- 16) Improper impeachment of a witness-preclude the State from asking a witness if the officer is lying or implying such (prosecutor misconduct)
- 17) Preclusion of Unreliable Evidence (Vertical Nystagmus)
- 18) Prosecutor may not ask witness to speculate-i.e. ask any witness not a passenger if they would feel comfortable as a passenger, etc.
- 19) Preclude any PBT testimony (if # high).
- 20) Preclude any testimony regarding previously suppressed evidence at any time during trial

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Common defense motions in Limine

- 21) Motion in Limine to require State to elect whether it will be seeking the statutory impairment presumptions
- 22) Motion in limine to preclude any evidence of the defendant requesting the assistance of an attorney at any point during the investigation. It is irrelevant and invites the jury to draw unfairly prejudicial negative inferences from the request for attorney advice and assistance.

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The good guys motions...?



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Motion in Limine -State



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State Motions In Limine

- Step 1 -File your Motions:



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Motions in Limine for the State

- DUI Trial # 1 Problem– DEFENSE EXPERTS AND JUNK SCIENCE
- HOW DO I KEEP THE JUNK SCIENCE OUT?

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"I object!" – Filing State Motions in Limine to Preclude



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Standard Motions in Limine – Blueprint

- A "How to" - start with:
- 1) AZ Rules of Evidence Rule 402 General Admissibility – "Irrelevant evidence is not admissible".
- Go to: 2) AZ Rules of Evidence Rule 403 -The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, misleading the jury, wasting time or needlessly presenting cumulative

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Motions in Limine-Blueprint

- Finish with: 3) RULE 702- Testimony by Experts
 - A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if :
 - A) The experts specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
 - B) The testimony is based on sufficient facts or data.
 - C) The testimony is the product of reliable principles and methods; and
 - D) The Expert has reliably applied the principles and methods to the facts of the case.
 - (NOTE - The defense has to show all of the above!)

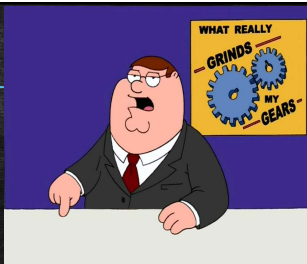
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The Defense hates Motions in Limine filed against them



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Motion in Limine

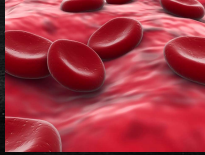


You know what REALLY grinds my gears?
The words "Could of"!!!

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Example: State Motion in Limine #1 - Motion in Limine to Preclude Micro-clots

- EXAMPLE – Claim by defense is going to be there “could have” been micro-clots.
- There are microscopic clots in the States blood sample reducing the actual volume of blood, thus artificially increasing the alcohol concentration in the sample.



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Motion in Limine # 1

- You argue any defense testimony is irrelevant (Rule 402) as there is no showing of proof for this particular defendant.
- The court should exclude this testimony because any probative value (the defendants blood sample could be wrong!) is substantially outweighed by the danger of unfair prejudice to the state (no actual showing, and no studies on micro-clots), misleading the jury that something could have happened, and wasting time (mere speculation). (Rule 403)

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Motion in Limine- defense evidence

- RULE 702 ARGUMENT -USE ALL PARTS OF RULE 702
 - Are there any studies that support micro clots actually exist (not just mention a micro clot as an abstract theory)?
 - Ask for the defense good faith proof (not just there is some study somewhere out there) of who (actual name of scientist and study) that has reliably studied actual micro clots and their effect on blood and alcohol?
- If none- What is the defense “good faith basis” for raising the issue?!

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Motion in Limine # 1 Micro-clots

- The testimony is NOT the product of reliable principles and methods -Rule 702 (C)
- The testimony is NOT based on sufficient facts or data - Rule 702 (B)
- It will NOT help the trier of fact understand an issue or help determine a fact in issue -Rule 702 (A) (Relevance?)
- If the defense expert did NOT test this blood, they cannot have reliably applied the evidence to the facts of the case - Rule 702 (D)
- In short, it doesn't meet any of the requirements of Rule 702!!

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Motion in Limine- defense evidence

- Micro clots- Is just a defense experts random supposition, with no supporting evidence of reliability, no showing that it actually occurred in our case, and all of which is highly prejudicial to the State actual facts.
- A winnable Motion in Limine?
- (Remember a Motion In Limine also makes your appellate record!)

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Motions in Limine # 2- Defense testimony of a Hanging Drop

- Preclude Defense claim - "The Hanging Drop"
- There could of been a drop of blood on the pipette tip which contained ethanol and which added too much blood to the headspace vial. More blood equals more alcohol!



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Motion in Limine- against defense evidence

- Hanging Drop Motion in Limine –winnable?
 - No evidence it occurred-pure speculation (Can't meet Evid. Rules 403 (a) or (b). Did you test the blood?
 - No studies support the proposition of causing a heavy influence
 - It is not based on reliable principles and methods (Rule 702)
 - The expert does not reliably apply the principles and methods to the facts of this case
 - There are not sufficient facts or data, so it does nothing to help the jury and causes confusion.

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Motion in Limine # 3 – PBT's



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Preclude Defense from admitting result of PBT as "under .08" or actual number

- Motion in Limine to prevent the defense from admitting an actual PBT number
- They cannot meet the requirements of ARS 28-1323(A)
 - Observation period and second sample or 15 minute deprivation with duplicate test?
 - What calibrations were performed on the PBT?
 - Is that specific instrument approved by DPS?
 - Does it meet the Rules of Evidence Rule 702?
- See also *State ex rel McDougall v. Johnson* 181 Ariz. 404 (App. 1995)

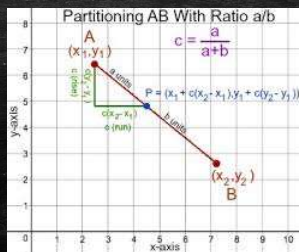
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Motions in Limine

- Is this a legally winnable motion?

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4 - Partition Ratios- Motion in Limine



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States Motion in Limine #4 - Partition Ratios (Cooperman/Guthrie)

- PARTITION RATIOS (Also called 2100 to 1 or blood to breath ratio)
 - 1) Defendant might have an abnormally low partition ratio causing an elevated breath alcohol concentration (BrAC)
 - 2) Defendant may have had a fever that caused an elevated BrAC (But everyone's temperature rises/changes throughout the day)

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Motion in Limine

- Testimony as to fever- says who?!
- If the defendant, self-serving hearsay!
- If the expert- Cite Evidence rules Rule 402, 403 and 702. Again, tested this defendant?



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Motions in Limine - States Motions (PRE)

- *Cooperman* held that partition ratio evidence (PRE) is not relevant to the DUI (A) (2) charge
- Partition ratio is only relevant to the (A) (1) impairment charge
- PRE is admissible without evidence of defendants individual physiology (decision is missing the Rule 702 analysis) however;
- This is subject to Rule 403 weighing test
- Either party can invoke the DUI presumptions

- *State v. Cooperman*, 232 Ariz. 347 (2013)

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Motion in Limine- States Motion

- So ...Partition Ratio Evidence is not admissible for the Per Se charges!
 - *Cooperman* says so directly.
 - Then move to prevent any arguments by the defense on the .08
 - Settle the jury instructions that the jury may not consider the 2100 to 1 partition ratio evidence for the per se (A) (3) charges.
 - (A) (1) still subject to Rule 403 weighing test
 - You need to bring up Rule 702 as a difference from *Cooperman* as Court did not consider it for the (A) (1) and should be denied.

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Motion in Limine- States Motions

- If partition ratio allowed for (a) (1) charge
 - Point out during motion that this benefits the defendant without any scientific proof it actually applied to this defendant. (unfair prejudice/reliably applied?) Assuming an average ratio the breath test will be 10% low compared to the blood test.
- At the least court should submit a limiting instruction for the jury and make it clear to the jury that it does not apply to the per se charges.

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More Motions in Limine against the defense

- Prohibit "Arterial v. Venous Blood" defense – Location where the blood is drawn is important if in the elimination phase! – but absorption is 30 to 40 minutes and the statute does not distinguish (plus what, a 3-5% difference?) Winnable?
- Can't argue "Salting out" – An increase in sodium decreased the liquid part of the blood sample which increases ethanol concentration! – When a criminalist prepares a blood sample, it is standard procedure to dilute it with water, which, at a minimum, offsets the salting out? Winnable?
- Hematocrit levels – The defendant has a high level of hematocrit red blood cells and a lower concentration of plasma/liquid part of blood which equals a higher alcohol concentration. – What evidence you have that this defendant has this condition? Samples diluted with water so offset?



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Motions in Limine against the defense

- Hidden peak – If unknown substance are being detected, they could be hidden under ethanol peak, artificially increasing the amount of ethanol being detected! – Each substance has own unique retention time. Only ones close to ethanol are extremely toxic substances, to where subject would not be alive. Winnable?
- Mystery peaks – There are mystery peaks which are not identified so whole sample is contaminated! – First is electronic pulse from starting, one other is acetaldehyde-a metabolite of alcohol. Others could be due to medications (blood pressure?). Others could be sodium fluoride or potassium oxalate from tube preservatives. In short, it means the machine is working as it ought to and identifying element. Did it affect the ethanol reading in any way? Winnable?



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Motions in Limine against the defense

- No preservatives! – State has no actual knowledge present in blood vial!– Sodium fluoride and potassium oxalate are packaged together, if no potassium oxalate, blood would clot. If no sodium fluoride and no refrigeration) have bacterial growth and discoloration. (Winnable?)
- Wrong vial- The vial was placed into an auto-sampler and the criminalist was not there when the blood sample was tested!- The criminalist follows a procedure to insure each vial is properly placed in the auto sampler and also the duplicate test would be off to show it! (Winnable?)



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Motions in Limine against the defense

- Still others you may want to consider!
- Prevent arguing Optokinetic Nystagmus? - Flashing lights caused nystagmus! -Must be fixated to have, and if no resting nystagmus didn't have it?
- Prevent argument of carry-over - Peak tailings are indicative of carry-over! -If tailings are on the B column, B does not quantify, it would show up in the blank or negative control and/or in the internal controls and calibrators.
- Prevent testimony of statistical stacking – have to add all the possibilities together! – Any valid scientific theory allowing you to do so?
- OTHERS? (RFI, etc.)



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Continuing States Motions in Limine



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STATES MOTIONS IN LIMINE TO ADMIT EVIDENCE

- States Motions in Limine we use to admit States evidence.

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States Motions in Limine -PBT refusal

- State moves in limine to admit a PBT refusal!
- There is no constitutional right to refuse!
- Refusal is not testimonial evidence so no 5th amendment issues (See *State v. Superior Court (Ahrens, RPI)*, 154 Ariz. 574 (1987))
- A DUI suspect has the power, but not the right, to refuse to submit to testing. See *State ex rel Verberg v. Jones (Phipps, RPI)*, 211 Ariz 413 (App. 2005)

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States Motion in Limine - PBT refusal

- It does not matter the test itself would have been inadmissible
- It is relevant to demonstrate consciousness of guilt
- There is no legal authority that excludes it
- Can admit and comment, just like an FST refusal and/or blood/breath test refusal.
- Should get a jury instruction on it at least

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States PBT Motion in Limine # 2- to admit PBT for "presence of alcohol"

- Present PBT for only the "presence of alcohol".
- PBT results are not admissible as they do not meet the requirements of ARS 28-1323 (A)
 - Need foundation to admit "for the purpose of determining a person's alcohol concentration . (the state statutory language).
 - We are not doing that. No alcohol concentration

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States Motion to admit PBT presence of alcohol

- Neither statutes or the case law suggest any foundation is needed for mere presence of alcohol!
- It is relevant! (Rules 402 and 403)
- Where is the authority to suppress?
- Statutory foundation ensures accuracy of results, for mere presence not necessary and not in the statute
- (NOTE- However, you will need a witness who will testify a PBT is capable of detecting the presence of alcohol)

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Presence of alcohol Remember-Proceed with Caution!



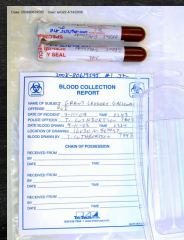
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Just in case there is a mistrial request...

- What is the Legal Objection?
- Evaluate what was said (PBT or preliminary breath test?)
- Did the number come in and is there any harm? Didn't the officer also testify they smelled the presence of alcohol?
- Again, only reason results not admissible is the requirements of ARS 28-1323 (A) (Statute states- "for the purpose of determining a persons alcohol concentration")
- Mistrials are supposed to be the rare exception

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States Motions in Limine # 3- Mentioning Second Samples



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Motion in limine # 3- Commenting on second sample

- If the defendant :
 - 1) Requests and obtains a sample for his/her own use, AND...
 - 2) Attacks the validity of the States test

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Motion in limine- commenting on second sample

The State may:

- 1) Cross examine them (if they take the stand) about receiving a second sample and
- 2) Comment on defendants failure to produce evidence of the second sample results at trial (reasonable inference against him/her).

See *State ex rel McDougall v. Corcoran (KEEN, RPI)*, 153 Ariz. 157 (1987)

(If they test the blood and notice an expert, file a motion for disclosure)

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Motion in Limine- Keen allows it

- Challenge the defendant and court for any legal authority that holds we cannot discuss the second sample and argue the reasonable inferences flowing from it.
- Make sure there is enough blood left for testing before making this argument!



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States Motion in Limine # 4- Preclude Self Serving Hearsay

- Probably the most common used States motion in limine- To Preclude Self-Serving Hearsay!
 - "I only had two beers" or "I last smoked a week ago"
 - See *State v. Barger*- 167 Ariz. 563 (App. 1990) – The defendants attempts to admit his statement through the arresting officer was properly precluded as self-serving hearsay. Also see *State v. Wooten*, 193 Ariz. 357 (App. 1998)



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Motions in Limine

- Barger was an assault. The police spoke to him the day afterward, and he told the police he felt threatened by one victim's gesture and another person showed a machete, so he pulled a gun and threatened them.
- The Court says the statements to police were not against his interest, so doesn't qualify for a hearsay exemption, and given they were the day after and defendant had time to think about things they were not reliable and trustworthy.
- Wooten is a murder case where the defendant gave self serving statements to witnesses (again the day after the event). For us- statements before or after FST's?

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Motions in Limine # 5 - State

- Always file a motion in limine on using Suppressed evidence (Statements) (defense will probably file against your using at any time)
- *Harris v. New York*, 91 S.Ct. 643 (1971); *U.S. v. Havens*, 100 S. Ct. 1912 (1980); *State v. Menard*, 135 Ariz. 385 (App. 1983)
- Suppressed evidence can be used to impeach! The defendant cannot "use the Constitution as a shield and a sword".



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State's Motion in limine -admit

- Still other possible motions in limine to file for DUI's:
- Allow 9-1-1 and dispatch recordings
- Showing body camera video either in entirety, or only relevant part
- Breath test with calibrations greater than 30 days apart

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MOTIONS IN LIMINE - DUI drugs



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Motions in Limine - marijuana

- Post *Ishak*,
WARNING_ Previous Motions in Limine
should not be filed!

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WHAT NOT TO DO IN A MARIJUANA DUI!

- Do NOT file a Motion in Limine to preclude admission of an AMMA card.
- See *Ishak v. McClennan*, 241 Ariz. 364 (2017)
- Even the well written dissent agreed they could present their card as part of their affirmative defense.
- DO File a motion in limine about there must be some testimony presented showing amount in blood insufficient to prove impairment. Argue the cases of *Dobson v. McClennan*, 238 Ariz. 389 (2015) and *Ishak*. Then point out the Arizona Rule is we get to cross examine over anything if the defendant testifies!

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Motions in Limine- State drug arguments

Prescriptions?



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Drug Motions in Limine- State

- File a Motion in Limine to preclude the defense from calling it a prescription!
- It is only a "recommendation".

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Motions in Limine- By State on a DUI drug case

- Motion in Limine on Prescription drug defense
 - Just what the doctor ordered...and ONLY what the doctor ordered
 - ARS 28-1381 (D) Defendant must prove he took the prescription as prescribed.
 - State v. Bayardi (Fannin, RPI) 230 Ariz. 195 (App. 2013)

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Motions in Limine- State

- Preclude any mention of a prescription! Why?
 - They need a Doctor- if not there, the prescription information is hearsay!
 - Use it to settle jury instructions



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Motions in Limine

- CONCLUSION
- Please, have some standard motions in limine and use them regularly. Argue Rules 402,403 and 702. help stop the "junk science" and a Motion in Limine is a great way to educate.

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In conclusion



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Thank You!

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